

B.B.

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 64464-g43E BY DAVID W.)	
CASAGRANDE)	

* * * * *

The Proposal for Decision in this matter was entered September 28, 1988. The Proposal recommended that the Application for Beneficial Water Use Permit No. 64464-g43E be conditionally granted in an amount of 437 gallons per minute up to 182.5 acre-feet for new sprinkler irrigation. Written exceptions to the Proposal were filed, and an oral argument was requested pursuant to MCA 2-5-621(1) by attorney Ward Swanser on behalf of Objectors Jack Halverson, James and Leona Green, James M. Reinhardt, Bert H. Vermandel, and Eldon and Bethene Vermandel. An oral argument hearing was held before the Assistant Administrator of the Water Resources Division March 7, 1989, in Billings, Montana. Appearing at the oral argument hearing were Applicant David W. Casagrande and his attorney, Chris J. Nelson, and Objectors Jack Halverson, James Green, James Reinhardt, Bert Vermandel, Eldon Vermandel, and their attorney Ward Swanser. The DNRC has considered the exceptions and the oral arguments and responds to them as follows.

In Exception No. 1, the Objectors object to the statement contained on page 3 of the Proposal for Decision that no objections were made to the introduction of the Department's file into evidence. Objections were made by letter of August 16,

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1988, to the original application and other portions of the file and listed several reasons.

On August 17, 1988, the Hearing Examiner received a letter purporting to be the Objectors' objections to the file documents. The Hearing Examiner's review of the letter, however, showed that the objections were not procedural objections relating to the admissibility of the documents but were substantive factual and legal arguments on the issues in the matter and, therefore, could not be accepted for the record. (See Notice of August 19, 1988.) Therefore, the statement in the Proposal for Decision that no objections were made of the Department files is accepted as proposed by the Hearing Examiner.

In Exception No. 2, Objectors object to the denial of their motion to void the application since the Applicant constructed and enlarged his groundwater pit without prior authorization.

I concur with the Hearing Examiner's denial of the motion that nothing in the statute suggests that the Department may deny an application because of such violation. The Department does not, however, condone the violations by the Applicant in this case. The orderly administration of water rights in Montana depends on compliance with the laws and regulations relating to the appropriation of water for beneficial use by all of its citizens. We trust that Mr. Casagrande will commit no further violations in pursuing a right to use this precious resource.

The Objectors except in Exception No. 3 to the Hearing Examiner's denial of their motion that the application be denied

because the Department had not acted within the time frame set in 85-2-310, MCA, for action on a permit. The Hearing Examiner's action and reasons are appropriate, and I concur with the Proposed Order.

In Exception No. 4, the Objectors except to the Hearing Examiner's rejection of the Objector's motion to deny the application because groundwater users were not properly notified.

A review of the record in this matter indicates that the application was properly noticed. Public notice was published in The Billings Gazette July 1, 1987 (see Finding of Fact #3). Individual notice was sent to water right owners of record in the vicinity as attested to by affidavit of service dated June 30, 1987, by Jan Gerke of record in the file. Mr. Swanser admitted at the oral argument that his address listed in the water rights records is not his current address and that he had not notified the Department of his new address. There is no evidence of failure of notice. The parties did appear as Objectors, and no rights were prejudiced. I concur with the Hearing Examiner's denial of this motion.

The Objectors excepted (Exception No. 5) to the Hearing Examiner's denial of the Objectors' motion to dismiss the application because the Department failed to hold the "promised pre-hearing meeting." I concur in the Hearing Examiner's denial of the motion.

In Exception No. 6, the Objectors except to the Hearing Examiner's denial of their motion to deny the application because

the Applicant has not met the statutory criteria. The Hearing Examiner properly denied the motion, since the Applicant did provide at the meeting enough evidence that the decision must be made by weighing the evidence provided by all parties rather than by granting a summary judgment.

In Exception No. 7, the Objectors object to Finding of Fact No. 1, since the Applicant constructed and enlarged his groundwater pit without prior authorization from the Department. Even though the groundwater pit was constructed and enlarged according to Finding of Fact No. 6, there is no implication that the Hearing Examiner's Finding of Fact No. 1 is in error. Therefore, Finding of Fact No. 1 is not in error and is accepted.

The Objectors except (Exception No. 8) to Finding of Fact No. 4, alleging error in the finding. There is no error in the finding since it reflects the quantities per the application and public notice. In Finding of Fact No. 6, the capacity of the test pit is computed to be approximately 1.7 acre-feet at the dimensions of 40 feet wide by 250 feet long and 15 feet deep--not 5.5 acre-feet. However, regardless of the size of the test pit or estimated dimensions of the finished pond, the Applicant cannot construct the pit larger than 5.5 acre-feet or withdraw at a rate greater than 437 gpm once the Temporary Permit is approved. Pursuant to § 85-2-312, MCA, the Department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested.

I find no error in Finding of Fact No. 5, which is adopted as proposed, and Exception No. 9 is rejected. The Hearing Examiner's opinion is that the application is for irrigation use, and no application or use is authorized for waterfowl use.

Objectors' Exception No. 10 to Finding of Fact No. 6 suggests an alternative finding. The record indicates that Finding of Fact No. 6 is accurate as proposed by the Hearing Examiner. Therefore, I concur with the finding.

The Objectors object to Finding of Fact No. 7 in Exception No. 11. They assert that while the finding reflects some of their concerns, additional unreflected concerns are the effect on groundwater wells in the area, whether proper notice was given to groundwater users in the locality so that they could object and protect their rights, and whether there has been proper determination as to what the impact or effect of the Applicant's use would have on existing groundwater.

Finding of Fact No. 7 is not in error and is accepted as proposed. The Hearing Examiner properly imposes requirements that testing and measurements be obtained to gather information concerning the groundwater characteristics as well as the possible effect on water users in the area. (See Conclusions of Law No. 7 and 8.)

The Objector asserts in Exceptions No. 12 and 13 to Findings of Fact No. 8 and 9 that additional facts be added and included as additional findings by the Hearing Examiner. I have examined the attached statements summarizing testimony taken at the time

of the hearing. The findings of the Hearing Examiner in this matter are based on substantial, credible evidence, are not arbitrary or capricious, and Findings of Fact No. 8 and 9 are not in error.

The Objector excepts to all Proposed Conclusions of Law No. 1-11 for the reasons stated in the objections to the Findings of Fact. After examining the arguments made, I concur with the Proposed Conclusions of Law as proposed by the Hearing Examiner. The Hearing Examiner has properly characterized the dilemma faced by the Applicants and Objectors when groundwater appropriations are proposed in areas for which very little data exists concerning the groundwater and the effects of its use on others in the area. (See Conclusions of Law No. 7 and 8.) The appropriate remedy is to gather data and measurements through an Interim Permit rather than speculate as to the groundwater characteristics and the effect on other water users. The Hearing Examiner cites in Conclusion of Law No. 9 the Department's authority and purpose of an Interim Permit and recommends in the Proposed Order utilization of this tool to further define the facts in this matter.

At the oral argument, the Objectors requested that information concerning testimony of Keith Kerbel outside the record of the contested-case hearing be considered. Objectors have not shown that this information was not reasonably available at the time of the hearing or that the additional testimony would likely change the results of the decision herein. Therefore,

pursuant to ARM § 36.12.229(2)(a), this request is denied and any information discussed that was not in the record was not considered.

After my review of the Proposed Order, however, I have determined that an additional review shall be implemented. Item "F" of the Proposed Order is modified herein to allow Objectors to review information gathered through the Interim Permit procedure.

WHEREFORE, based on the foregoing and the evidence in the record herein, the Department makes the following

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, an Interim Permit is hereby granted to David W. Casagrande to conduct tests and measurements to determine aquifer characteristics and impacts to the parties in this matter to appropriate a maximum of 437 gallons per minute up to 182.5 acre-feet of water for new sprinkler irrigation of 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and 20 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 1 South, Range 27 East, Yellowstone County, Montana. The source of supply is groundwater to be diverted by means of a pump from a pit located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 1 South, Range 27 East, Yellowstone County, Montana. The period of use shall be April 15 through September 30, inclusive.

This Interim Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. In order to receive an Interim Permit in this matter, the Applicant must elect to pay the \$10.00 Interim Permit filing fee and all reasonable and necessary costs of installing and maintaining a monitoring system capable of recording the effects the Applicant's pumping has on the source aquifer with regard to water availability and potential drawdown effects. The type of measuring devices used, the installation and maintenance of the devices, and the procedures for keeping accurate records of the resulting data shall be subject to the supervision of a Department geohydrologist or his delegate.

Prior to commencing any appropriation pursuant to the Interim Permit, the Applicant must have contacted one of the Department geohydrologists and made acceptable test arrangements, which include a written outline of the arrangements and agreement by the Applicant to follow the agreed-upon monitoring plan.

B. The Permittee shall install a flow meter in the line and shall keep a written record of the flow rate and volume of all water withdrawn and of the times of pumping. These records shall be made available to the Department upon request.

C. The Permittee shall isolate his groundwater pit from Coburn Ditch by moving enough of the excavated soils or of other fine-grained, relatively impermeable materials between the pit and the ditch that surface water from Coburn Ditch is effectively prevented from reaching the Applicant's groundwater pit. This barrier shall be maintained.

D. This Interim Permit is subject to all prior and existing rights and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

E. Issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

F. This Interim Permit shall be valid through September 30, 1989, for purposes of determining the availability of water in the aquifer and drawdown effects. Subsequent to the expiration of the Interim Permit in this matter, a Temporary Permit will be issued to the Permittee for two years, unless the testing results in data that indicates that adverse effects to the water rights of other appropriators will occur. Prior to issuance of any Temporary Permit, the test data and a written evaluation of the data by the Department geohydrologist will be made available for review by the parties. Parties will be allowed 30 days to review the data and evaluation and file a petition to reopen the hearing in this matter for the limited purpose of specifically rebutting or cross-examining the test data and evaluation. Test data shall be periodically submitted to the Department and will be furnished to any objector or water user upon request. Upon

evaluation of the test data and report and testimony of the Objectors, the Department will notify the parties as to its grant or denial of a Temporary Permit if no petition to reopen the hearing is received.

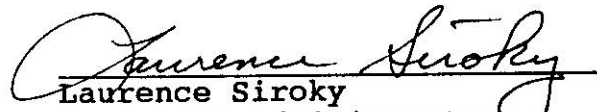
Pursuant to § 85-2-312(1), MCA, any Temporary Permit issued may grant a flow rate or volume modified downward to the rate that the Applicant's permitted means of diversion is capable of maintaining, or the flow rate utilized by the Applicant's diversion system, whichever is less, but in no case will the flow rate exceed 437 gallons per minute or 182.5 acre-feet per annum.

Any Temporary Permit issued in this matter will contain the permit conditions set forth in "D" and "E" above, as well as any other necessary conditions.

NOTICE

The Department's Final Order may be appealed in accordance with § 85-2-702 of the Montana Administrative Procedure Act by filing a petition in the appropriate district court within thirty (30) days after service of the Final Order.

Dated this 17 day of April, 1989.


Laurence Siroky
Assistant Administrator
Water Resources Division
Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER In the Matter of the Application for Beneficial Water Use Permit No. 64464-g43E by David W. Casagrande was duly served upon all parties of record at their address or addresses this 18th day of April, 1989, as follows:

David W. Casagrande
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Billings, MT 59102


Sally Martinez
Secretary

CASE # 64464

B.B.

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 64464-g43E BY DAVID W. CASAGRANDE)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 14, 1988 in Billings, Montana.

David W. Casagrande, the Applicant in this matter, appeared at the hearing in-person and by and through counsel Chris J. Nelson.

Objector Jack Halverson appeared at the hearing in person and by and through counsel Ward Swanser.

Objector James Green appeared in person on behalf of Objectors James and Leona Green, and by and through counsel Ward Swanser.

Objector James M. Reinhardt appeared at the hearing in person and by and through counsel Ward Swanser.

Objector Bert H. Vermandel appeared at the hearing in person and by and through counsel Ward Swanser.

Objectors Eldon Vermandel appeared in person on behalf of Objectors Eldon and Bethene Vermandel, and by and through counsel Ward Swanser.

Objectors Gordon and Gayle Wash, and Objector U.S. Department of Interior did not appear at the hearing in this matter in person or by representation.

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Mark Shapley, hydrogeologist with the Department of Natural Resources and Conservation (hereafter, the "Department"), appeared as staff expert witness. Keith Kerbel, Field Manager of the Billings Water Rights Bureau Field Office, appeared as a staff expert witness.

EXHIBITS

The Applicant did not offer any exhibits for inclusion in the record in this matter.

The Objectors offered five exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1 consists of five photographs: three photographs taped together to show the area between the Applicant's pit and the Coburn Ditch, and two photographs of Objector Halverson standing in a channel which runs between the pit and the ditch. (Photos taken in first week of July by Objector James Green.)

Objectors' Exhibit 2 consists of photocopies of Certificate of Water Right No. 56240-g43Q and its accompanying Well Log Report, for Objector Jack Halverson's well.

Objectors' Exhibit 3 consists of photocopies of two Statements of Claim for Existing Water Rights and the accompanying documentation filed by Objector James Green (10 pages).

Objectors' Exhibit 4 is a one-page photocopy of a map of the Coburn Ditch, obtained from documents filed by the Crow Indian Tribe, showing the Ditch to have been in existence in 1900. The

parties agreed that the location and size of the Applicant's pit, as marked on the Exhibit, are only approximate.

Objectors Exhibit 5 is a photocopy of Abstract No. 74191, consisting of a Notice of Appropriation of Pryor Creek water and attendant ditch rights, filed on behalf of the Crow Indian Reservation. (Filed May 10, 1920, claiming a priority date of April 1, 1900.)

Objectors Exhibits 1, 2, 3, 4, and 5 were accepted for the record without objection.

The Department did not offer any exhibits for inclusion in the record in this matter. The Department file, which contains the originals of the Application and the Objections, correspondence between the Department and the parties, Department reports and processing documents, and Mark Shapley's December 30, 1987 Report on the Application in this matter, was made available at the hearing for review by all parties. No party made objection to the admissibility of any part of the file. (See August 19, 1988 Notice.) Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner made a site visit to the proposed project immediately following the hearing in this matter.

PRELIMINARY MATTERS

Counsel for the Objectors moved that the Application in this matter be denied, on several bases which the Hearing Examiner agreed to address in the present Proposal. (For purposes of response, similar issues have been grouped together.)

1. The Objectors moved that the Application be denied because the Applicant constructed and enlarged his groundwater pit without prior authorization, contrary to MCA §85-2-302, or alternatively, that it should be denied because this statutory violation shows that the Applicant lacks good faith. (See MCA §85-2-301.) The Hearing Examiner denies the Objectors' motion.

Failure to comply with Title 85, Chapter 2 results in a misdemeanor (see MCA §85-2-122), which could result in a fine or in imprisonment (see MCA §46-18-212); however, nothing in the statutes suggests that the Department may deny an application because of such a violation. The Department does not have discretionary power to substitute its own penalties for those specified in the statutes; to impose an additional penalty or alternative penalty is beyond the Department's jurisdiction. The statutory remedies are the sole means to correct unlawful uses of water, apart from requesting voluntary compliance with the Water Use Act.

2. The Objectors moved that the Application be denied because the Department has not acted within the time frames set forth in MCA §85-2-310 for action on a permit. The Hearing Examiner denies the Objectors' motion.

The Department maintains its position that the time periods specified in the statute are directory rather than jurisdictional, and that failure to act within them does not trigger a mandatory duty in the Department either to approve or to deny a water use permit application. This position was upheld

in the court decision in Carey v. Montana Department of Natural Resources and Conservation, Civil Cause No. 43556 (First Judicial District, 1979). For a more complete discussion, see the April 22, 1987 Proposal for Decision in Application for Beneficial Water Use Permit No. 62231-g41I by City of East Helena. (Final Order, May 27, 1987.)

3. The Objectors moved that the Application be denied on the basis that groundwater users in the area were not properly notified. The Hearing Examiner denies this motion.

A review of the record in this matter indicates that the Application was properly noticed. The public notice was published in a newspaper of general circulation in the area of the source, as required by MCA §85-2-307(1), and stated that the source for the proposed appropriation is groundwater. (See Public Notice.) The individual notices were sent out to one other groundwater user (other than the Applicant), and to nearby users of surface water from the nearby Coburn Ditch and Pryor Creek. The processing documents in the file indicate that these were the appropriators whom the Department records indicated might be affected. Such appropriators are the only water users for whom the individual notices are required: the Department is not required to give notice to all water users in the entire area, if Department records do not provide reason to believe that the effects of the applied-for project will extend that far.

4. The Objectors moved that the Application be denied because the Department failed to hold the "promised pre-hearing meeting." The Objectors argue that the meeting would have given

them an opportunity to arrange for testing of Applicant's groundwater pit. The Hearing Examiner denies this motion.

A review of the letters to the parties which inform them that a pre-hearing meeting might be held specifically state that such a meeting will be held only if deemed necessary by the field office manager. The decision is a purely discretionary one, made at the Field Office level, and does not promise that such a meeting will be held. Furthermore, there is no evidence that any of the Objectors attempted to make arrangements to have testing done, or that such arrangements were dependent upon holding a meeting. No motions regarding such testing were filed by the Objectors.

5. The Objectors moved that the Application be denied on the basis that the Applicant did not apply for waterfowl use. The Hearing Examiner denies this motion.

The issue of whether the Department can grant a permit for a use which was not applied for is separate from the question of whether or not the Department can grant a permit for the use for which Application has been made; clearly, the Department must grant or deny the application based on what was applied for rather than on what was not.

6. The Objectors, prior to their own case, moved that the Application be denied on the basis that the Applicant has not met the statutory criteria. The Hearing Examiner denies this motion. The Applicant provided enough evidence that the decision must be made by weighing the evidence provided by all parties, rather than by granting what in effect would be summary judgment.

7. The Hearing Examiner hereby denies the Objectors' motion as made on any other basis or implied basis, since the remaining arguments (such as that concerning whether water from the proposed source is of sufficient quality for irrigation) are factual issues to be weighed in determining whether the statutory criteria for issuance of a permit have been met, rather than bases for summary denial of the Application.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA Section 85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in §85-2-306 do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 64464-g43E was duly filed with the Department of Natural Resources and Conservation on May 21, 1987 at 4:10 p.m.

3. The pertinent portions of the Application were published in the Billings Gazette, a newspaper of general circulation in the area of the source, on July 1, 1987.

4. The Applicant has applied for 437 gallons per minute ("gpm") up to 182.5 acre-feet of water for new sprinkler irrigation of 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and 20 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 1 South, Range 27 East, Yellowstone County, Montana. The water is to be appropriated by means of a groundwater pit with a storage capacity of 5.5 acre-feet, then pumped for sprinkler irrigation on the proposed place of use by means of a handline sprinkler system. The point of diversion is located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 1 South, Range 27 East, Yellowstone County, Montana. The proposed period of diversion is April 15 through September 30, inclusive, of each year.

The Applicant's testimony at the hearing indicates that the actual rate of diversion may be as low as 300 gpm, depending on the length of line that the Applicant uses ($\frac{1}{4}$ mile or $\frac{1}{2}$ mile), and the number of sprinkler heads. The Applicant further testified that the acreage to be irrigated is slightly greater than 55 acres. The exact flow rate will not be known until the irrigation system is put into use; however it will not in any event exceed the requested rate of 437 gpm.

The volume applied for is based on full-service irrigation for a crop of alfalfa. (Testimony of Keith Kerbel.) However, the Applicant intends to grow alfalfa and certain types of wheat recommended by the Soil Conservation Service. The Applicant testified that he intends to irrigate for only one or two seasons, until groundcover is established, due to the possibility that poor water quality could damage his land if long-term

irrigation is implemented. (See December 30, 1987 Report by Mark Shapley, page 4.)

5. The Applicant testified at the hearing in this matter that he intends to cease irrigation once groundcover is established on his property, and to then utilize his groundwater pit for a waterfowl pond. He has already obtained a cost-sharing arrangement from the ASCS, based on his agreement to follow rules for maintaining the pond for long-term waterfowl use. The Applicant stated that the waterfowl use would not require a consumptive use of water, apart from replacement of evaporative losses.

The Application filed in this matter, and therefore the Public Notice, does not list a waterfowl pond as one of the intended uses of the Applicant's proposed project. The Applicant testified that he was not aware that he had to apply for, or provide any information concerning, the use of the groundwater pit for waterfowl, since he had already had his plans for a waterfowl pond "approved" by ASCS.

6. The Applicant constructed a "test pit" in 1987, approximately 40 feet wide by 250 feet long, with an average depth of 14 or 15 feet and a maximum depth of approximately 18 feet. The Applicant testified that water was encountered in the area of 12 to 15 feet of depth during the excavation, and that it "bubbled" up through the bottom of the pit in the area of the pit furthest away from the Coburn Ditch, which was located approximately 80 feet away from the site of the test excavation. (Testimony of Applicant; Shapley Report, page 1.)

Department hydrogeologist Mark Shapley tested water taken from the test pit, from Coburn Ditch, and from the Applicant's domestic groundwater well. Based on field water chemistry, the source of water in the pit was determined most probably to be groundwater, possibly mingled with some surface water. (See December 30, 1987 Shapley Report, page 3.)

Since the testing was done in November, 1987, the Applicant has enlarged the initial excavation with a drag line, to hold enough volume so that it can be used for irrigation and, later, for waterfowl. (Testimony of Applicant.) There is no test data in the record to indicate whether the water which has filled the enlarged pit is groundwater, surface water, or a combination of both.

The Applicant estimated the finished pit size will be approximately 80 to 100 feet wide by 1,000 feet long. The July 14, 1988 site visit indicates that the pit presently is somewhat smaller than the size indicated by the Applicant as being the intended final dimensions. The site visit also indicates that the pit now extends to within approximately 30 to 40 feet of the Coburn Ditch, and that there is a shallow channel between the two. The Applicant testified that he is willing to build up the area between the pit and the ditch with dirt.

7. The Objectors' concern is that the proposed pumping of the Applicant's pit will adversely affect their surface water and groundwater rights in the area.

Testimony by the Objectors and by Department personnel indicates that water from the Coburn Ditch has overflowed the

ditch and commingled with pit water during times of high water in the ditch (testimony of Jack Halverson, Jim Green, Keith Kerbel), although the Applicant stated that he has never seen ditch water running into the pit. Some of the Objectors stated that water which was turned into Coburn Ditch in June ran out of the ditch into the Applicant's pit, and that they believe the filling of the expanded pit was due to surface water running into it.

(Testimony of Jim Green, Bert Vermandel.) Objectors Halverson and Green testified that there is a small channel, possibly caused by beaver or muskrat, that leads from the ditch to the pit. (See Objectors' Exhibit 1.)

The Objectors also expressed concern that the groundwater level in the area will be lowered over time if the Applicant pumps out of his pit, thus adversely affecting their wells, which draw from the same aquifer. (Testimony of Objectors Halverson, Bert Vermandel, Eldon Vermandel.)

8. No pump testing has been done on the Applicant's pit. The only information in the record on the issue of water availability is the Applicant's statement that he believes there is water in the amounts he has requested, based on the rate at which the pit filled with water, and Mark Shapley's statement that it is quite possible that a large pit such as the Applicant's may be able to yield the flow rate for which the Applicant has applied. Mr. Shapley stated that he thinks the shallow aquifer encountered by the Applicant during excavation is a valley-wide aquifer with reasonably high permeability, which is likely to deliver the amount of water requested, but that he does not have any data to confirm this belief.

In response to questions about the possible drawdown effects of the Applicant's proposed pumping, Mr. Shapley stated that he suspects the potential well interference effects of pumping the pit at the proposed diversion rate would not be great in the short term, given the size of the Applicant's pit, since the cone of depression caused by a given point of discharge from an aquifer is, in part, a function of the "diameter of the well" (the size of the surface opening which the water flows through): the drawdown gradient caused by a large pit is not nearly as steep as the gradient caused by a well.

Mr. Shapley noted that there is a potential for "system-wide" effects (effects on the entire area aquifer) if the Applicant's pumping is continued over a long period of time, but that more specific determinations on water availability and potential effects are not possible in the absence of information such as the transmissivity and storage characteristics of the aquifer.

9. A review of the Department records does not disclose other planned uses or developments of the source aquifer for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural rules have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(1) (a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely-affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water for irrigation is a beneficial use of water. See MCA §85-2-102(2). See Conclusion of Law 11 on the proposed use of water for waterfowl.

5. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been granted or for which water has been reserved. See Finding of Fact 9.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 4.

7. There is substantial credible evidence that the Applicant's proposed project will not adversely affect the water rights of a prior appropriator, if any permit which is granted in this matter is properly conditioned.

The record indicates that presently there may be some commingling of surface water from Coburn Ditch with groundwater in the Applicant's pit. (Findings of Fact 6 and 7.) However, if the area between the ditch and the pit is built up, as the Applicant has agreed to do, the pit should not receive any surface water from the Coburn Ditch, and the surface water users should not be adversely affected.

Nothing in the record suggests that groundwater users in the vicinity will experience well interference if the Applicant pumps from his pit for the short term irrigation which he proposes, although pumping over a greater number of years potentially could cause adverse effects in terms of aquifer drawdown and water quality. (See Finding of Fact 8; Shapley Report.) Therefore, any permit issued in this matter will be limited to the short term appropriation which the Applicant has expressed is his intent. (See Findings of Fact 4 and 5.)

8. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant. However, no test pumping has been done, and there is no data available on storage and transmissivity characteristics of the source aquifer which would allow projections of water availability to be made. (See Finding of Fact 8.) Therefore, the record does not contain substantial evidence that the full

amount of water requested is physically and legally available; that is, that the Applicant physically can obtain the full requested amount at his point of diversion, and that the amount is available over and above the amounts used by prior appropriators in the aquifer.

Testimony by the Department hydrogeologist indicates that it is possible that the requested amounts of water are available, (throughout the requested period of diversion, since there is no evidence suggesting that the source aquifer experiences fluctuations); however, no quantitative information has been presented.

Obviously, it is difficult for a potential appropriator to accurately determine the results of pumping groundwater prior to utilizing the proposed amounts of water, especially when there is little or no data available on the transmissivity and other salient characteristics of the source aquifer. It is likely in such instances that the sole means by which an applicant can satisfy his burden of proof is to begin appropriating water and monitor the resulting flow rate and effect on the aquifer. However an applicant is not entitled to take this step without obtaining a permit. See, generally, MCA Title 85, Chapter 2.

In the present matter, the Hearing Examiner believes that the Applicant should be given an Interim Permit for purposes of obtaining the data necessary to provide substantial credible evidence that the remaining permit criterion is met, since the Applicant has met the burden of proof on the other statutory

criteria and since it is likely that the criterion that water must be available in the amount requested can be met.¹

The grant of an Interim Permit should not act as a detriment to the Objectors, since approval of the applied for Provisional Permit is not automatic, and since the testing will be monitored for adverse effects to other diversions, among other monitoring purposes. The grant of an Interim Permit will not harm the Applicant, since the alternative is to deny his Application on the basis that he has not met his burden of proof, and since he has already completed the appropriation works (the groundwater pit) and purchased a substantial portion of the equipment and therefore should not be unduly financially burdened by participation in a monitoring program.

9. Montana Administrative Rule §36.12.104 states:

(1) Pending final approval or denial of an application for a provisional permit, the department may, in its discretion and upon proper application, issue an interim permit authorizing an applicant to begin appropriating water immediately for testing purposes.

(a) The department may issue an interim permit, unless there is substantial information available to the department that the criteria for issuing a provisional permit under section 85-2-311, MCA can not be met.

(b) An interim permit may be issued subject to any terms and conditions the department considers necessary to protect the rights of prior appropriators. Violation of a term or condition shall automatically void an interim permit.

¹Even if the testing does not indicate that the Applicant's full requested flow rate of 437 gpm can be obtained, it will provide information to allow the Department to modify the flow rate downward to the actual yield, so that the criteria can be met. See MCA §85-2-312(1).

(2) The issuance of an interim permit does not entitle an applicant to a regular provisional permit, and approval of the application for a regular provisional permit is subject to the procedures and criteria set out in the act.

(3) A person may not obtain any vested right to an appropriation obtained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the regular provisional permit is denied or is modified from the terms of the interim permit.

10. With the exception of §85-2-311 (a)(ii) and (iii), all statutory criteria have been proved by substantial credible evidence, and need not be addressed at the review stage prior to issuance of a temporary permit unless the test data indicates that reconsideration of a criterion (such as lack of adverse effect) is warranted. (See proposed condition F, below.)

11. The Department cannot grant a use for which the Applicant has not applied. See generally, MCA §85-2-302. Therefore, the Department cannot grant a Permit for the Applicant's proposed wildlife use. Even though this use is alleged to be nonconsumptive, it constitutes a year-round use of water, the specifics of which have not been publicly noticed and which potential Objectors have not been given an opportunity to address.

If the Applicant intends to proceed with his plans to utilize his groundwater pit as a waterfowl pond, he must make a separate application for that specific use.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, an Interim Permit is hereby granted to David W. Casagrande to appropriate a maximum of 437 gallons per minute up to 182.5 acre-feet of water for new sprinkler irrigation of 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and 20 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 1 South, Range 27 East, Yellowstone County, Montana. The source of supply is groundwater to be diverted by means of a pit located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 1 South, Range 27 East, Yellowstone County, Montana. The period of use shall be April 15 through September 30, inclusive.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. In order to receive an Interim Permit in this matter, the Applicant must elect to pay the \$10.00 Interim Permit filing fee and all reasonable and necessary costs of installing and maintaining a monitoring system capable of recording the effects Applicant's pumping has on the source aquifer with regard to water availability and potential drawdown effects. The type of measuring devices used, the installation and maintenance of the devices, and procedures for keeping accurate records of the resulting data shall be subject to the supervision of a Department geohydrologist or his delegee.

Prior to commencing any appropriation pursuant to the Interim Permit, the Applicant must have contacted one of the Department geohydrologists and made acceptable test arrangements, which include a written outline of the

arrangements and agreement by the Applicant to follow the agreed-upon monitoring plan.

B. The Permittee shall install a flow meter in the line, and shall keep a written record of the flow rate and volume of all water withdrawn, and of the times of pumping. These records shall be made available to the Department upon request.

C. The Permittee shall isolate his groundwater pit from Coburn Ditch by moving enough of the excavated soils or of other fine-grained, relatively impermeable materials between the pit and the ditch that surface water from Coburn Ditch is effectively prevented from reaching the Applicant's groundwater pit. This barrier shall be maintained.

D. This Interim Permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

E. Issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by the exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

F. This Interim Permit shall be valid through September 30, 1989, for purposes of determining the availability of water in the aquifer and drawdown effects. Subsequent to the expiration of the Interim Permit in this matter, a Temporary Permit will be

issued to the Permittee for two years, unless the testing results in data which indicates that adverse effect to the water rights of other appropriators will occur. Prior to issuance of any Temporary Permit, the test data and a written Department summary thereof will be made available for review by the parties, and the Department will notify the parties as to its proposed grant or denial of a Temporary Permit. The parties may request a chance to respond to the proposed decision.

Pursuant to MCA §85-2-312(1), any Temporary Permit issued may grant a flow rate modified downward to the rate which the Applicant's permitted means of diversion is capable of maintaining, or the flow rate utilized by the Applicant's diversion system, whichever is less, but in no case will the flow rate exceed 437 gallons per minute.

Any Temporary Permit issued in this matter will contain the permit conditions set forth in D and E, above, as well as any other necessary conditions.

G. The Applicant must notify the Department in writing within 30 days of issuance of the Final Order in this matter as to whether he wishes to proceed with his proposed appropriation pursuant to the conditions herein set forth. If the Applicant does not so notify the Department, or if he notifies the Department that he does not wish to proceed, the Application in this matter will be denied for failure to meet the statutory criteria of MCA §85-2-311.

NOTICE

This proposal is a recommendation, not a final decision.

All parties are urged to review carefully the terms of the

proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will

be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 28th day of September, 1988.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was served by first class mail upon all parties of record at their address or addresses this 28th day of September, 1988, as follows:

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